TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 972.

WARREN OZRO KYLE AND WILLIAM E. H. DOWER, ASSIGNEES IN BANKRUPTCY OF ELBRIDGE L. SWEETSER, BANKRUPT, APPELLANTS,

vs.

JOHN C. HAMMOND ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED FEBRUARY 8, 1912.

(23,048)

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a United States Circuit Court of Appeals for the First Circuit.
October Term, 1911.

No. 917.

WARREN OZRO KYLE et al., Petitioners, Appellants,
v.
JOHN C. HAMMOND et al., Respondents, Appellees.

Appeal from the Circuit Court of the United States for the District of Massachusetts, from Final Decree (Lowell, J.), September 27, 1910.

Transcript of Record.

Upon the Appeal of Warren Ozro Kyle et al. in the Above-entitled Cause, to the Supreme Court of the United States.

1 Circuit Court of the United States, District of Massachusetts.

In Equity.

No. 690.

WARREN OZRO KYLE and W. B. H. DOWSE, Petitioners.

In re ELBRIDGE L. SWEETSER, Bankrupt.

No. 7811, in Bankruptcy, under Law of 1867.

Petition of Warren Ozro Kyle and W. B. H. Dowse to Revise Certain Rulings of the District Court in said Case.

[Filed February 25, 1910.]

To the Honorable Judges of the United States Circuit Court for the District of Massachusetts:

The petition of Warren Ozro Kyle and William B. H. Dowse respectfully shows:

First. Elbridge L. Sweetser on his voluntary petition was duly adjudged a bankrupt February 23, 1878, and received his discharge August 6, 1881. He disclosed no assets except a small stock of goods heavily mortgaged, the proceeds of which were consumed in expenses. Claims against his estate were proved to the amount of $13,940.47, of which about $3500 have since been expunged. Your petitioner Warren Ozro Kyle discovered in 1881 an equitable interest belonging to the bankrupt though not scheduled in his assets, and began in 1882 the litigation referred to in the opinion
2 of the District Court (Exhibit D), in which he acted as solicitor and counsel for the assignees in bankruptcy, receiving

as a result of said litigation, which extended over a period of more than twenty-five years, $20,107.57, of which he turned over $15,000 deposited to the credit of the assignees and retained the balance to be applied to his own services and expenses as solicitor and counsel for the assignees as aforesaid. A dividend of thirty-seven per cent on claims proved has been paid to the executors, administrators and assignees of the various creditors; all questions as to ownership of claims have finally been determined, and the assignees have long been ready to submit their final account, wind up the estate and ask for their discharge.

On the second day of June A. D. 1909, the respondents John C. Hammond and others presented their petition unto the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts, a true copy of which petition is hereto attached and marked "Exhibit A".

Second. On the twenty-fifth day of June A. D. 1909, your petitioners filed their answer to said petition, a true copy of which is hereto attached and marked "Exhibit B". A demurrer to the answer was filed, and afterwards waived, and a general replication.

Third. On the twenty-eighth day of June A. D. 1909, the Honorable Frederic Dodge entered an order referring said petition Exhibit A to S. L. Thorndike, register in bankruptcy under the Law of 1867, for his action thereon.

Fourth. On the twenty-eighth day of December A. D. 1909, said register filed his report certifying the questions of law arising in said proceedings into the District Court, a true copy of which report is hereto attached and marked "Exhibit C".

Fifth. On the eleventh day of February A. D. 1910, the Honorable Frederic Dodge filed an opinion and made rulings therein on the questions certified into the District Court as aforesaid, said matter having been fully argued before said court, a true copy of which opinion is hereto attached and marked "Exhibit D".

Sixth. No proof was taken at the hearing before the Hon-
3 orable Frederic Dodge, the entire grounds on which said opinion and rulings are based appear in the exhibits hereto attached.

Seventh. Your petitioners are aggrieved by the following rulings of the District Court:

"It follows that it is wholly immaterial to the questions before the Register whether Mr. Kyle has or had not made disbursements and rendered services as counsel in connection with the litigation referred, or to what amount, if to any amount. The $4252.76 having been received by him in the manner stated, as is not denied, became at once money belonging to the estate which under Rev. Stats. § 5059, he was bound to deposit in the same designated depository as that in which the $15,000 had been deposited. The petitioners are entitled to have the order made, for which they ask."

"Mr. Kyle's disposition of the money may have been without Mr. Dowse's authority, approval or knowledge at the time, but the answer to the petition, which undertakes to justify what Mr. Kyle did upon the grounds stated above, is in the name of and is signed

by both assignees. Under these circumstances, I do not see why any order to be made should not be made against both of them."

Wherefore your petitioners pray that said rulings may be revised and set aside and held for naught, and that by order of this court it be decreed that your petitioners have a right to show what services had been rendered by respondent Kyle as solicitor and counsel in proceedings in equity to create, secure and protect the fund paid over to him, as stated in "Exhibit D," and that the evidence offered on this point was relevant and material; that your petitioners be permitted to establish the amount and value of the services rendered by your petitioner Warren Ozro Kyle as solicitor and counsel in creating, preserving and recovering the fund paid into his hands as the result of long and arduous litigation; that it be decreed that the amount so ascertained was and is rightfully retained out of said fund and is the property of your petitioner Warren Ozro Kyle; that it be decreed that no order should be made against your petitioner William B. H. Dowse in any event to deposit in any bank to the credit of the bankrupt estate or pay into court the whole or any part of said amount deducted by your petitioner Warren Ozro Kyle

4 on account of his services and expenses as solicitor and counsel in relation to said fund as aforesaid; and that your petitioners be given such other relief as shall be proper.

WARREN OZRO KYLE,
WILLIAM B. H. DOWSE,
By FRED JOY,
Solicitor.

WARREN OZRO KYLE,
Solicitor and of Counsel pro se.
FRED JOY,
Solicitor and of Counsel for W. B. H. Dowse.

Warren Ozro Kyle, one of the petitioners in the foregoing petition, does hereby make solemn oath that the statements therein contained are true according to the best of his knowledge, information and belief.

WARREN OZRO KYLE.

Sworn and subscribed before me this twenty-fifth day of February, A. D. 1910.

[SEAL.]

WILLIAM A. HAYES, 2D,
Notary Public.

EXHIBIT A.

UNITED STATES OF AMERICA:

District Court of the United States, District of Massachusetts.

In the Matter of ELBRIDGE L. SWEETSER, Bankrupt.

No. 7811. Under Law of 1867.

Petition of John C. Hammond and Other Creditors to Have Assignees Required to Return Money Unlawfully Taken from the Estate.

The undersigned creditors of the estate of Eibridge L. Sweetser respectfully represent as follows:

October 14, 1907, John C. Hammond, one of the petitioners, acting by his attorney Hollis R. Bailey, requested the assignees William B. H. Dowse and Warren O. Kyle, to comply with Rule
5 28, and called their attention to provisions of Sec. 5059 of U. S. Revised Statutes, said request being in writing and as follows:

"Mr. Clemmons informs me that Mr. Whittredge is about to turn over to the assignees something like $2000. on account of accrued income of the Sweetser fund. I desire to call your attention to Sec. 5059 of United States Revised Statutes requiring money to be deposited in some bank, also to Rule 28, requiring assignees to make a report at stated times of funds received by them, and also providing that no money shall be drawn except upon checks signed by the assignees and countersigned by the judge or register. This rule I think should be complied with in the present case, especially as the assignees, as I recall, are not now under bonds."

That said assignees shortly thereafter, to wit, on October 25, 1907, received from the estate of Solon O. Richardson the sum of $2661.25; that said assignees, disregarding said request and the provisions of said Rule 28, and of said Sec. 5059, failed to deposit said money in their name as assignees in a bank where the same could be drawn only upon checks signed by the assignees and countersigned by the register; that the said assignees paid out of the money so received something less than $100. for expenses incurred, and appropriated to their own use or to the use of the said Warren O. Kyle, the sum of upwards of $1500.

That afterwards, early in February, 1908, said assignees received from the estate of Solon O. Richardson the further sum of $17466.32; that said assignees thereupon appropriated to their own use, or to the use of said Warren O. Kyle, the sum of upwards of $3,000., said amount being taken before the same was deposited in a bank where it could be drawn only upon checks signed by the assignees and countersigned by the register.

That said appropriation by said assignees to their own use or to

the use of said Kyle of said money as aforesaid, amounting to over $4000., was unlawfully and in violation of the provisions of the United States Revised Statutes, Sec. 5012. That the fees which the said assignees might become entitled to for their services on the distribution of said estate, under the provisions of United States Revised Statutes, Sec. 5100, do not exceed the total amount of $400. That no petition for additional compensation has ever been filed by said assignees under the provisions of United States Revised Statutes, Sec. 5099, and General Order 30 as amended in 1877. That said assignees should be required to return said money to the estate, by depositing the same in the Merchants National Bank in the account which was opened by them at said bank, in their name as assignees after the appropriation to their own use of the money aforesaid.

6

Wherefore your petitioners pray that said assignees may be required forthwith to return said money wrongfully taken by them as aforesaid, and for such other relief in the premises as may seem to the court reasonable and proper.

JOHN C. HAMMOND.
JAMES A. TIRRELL,
Assignee of Magee Furnace Company, Dean, Foster & Co., Merrick Thread Co., Henry W. Dutton & Son, Judson A. Rockwood, A. E. Atwood, Stickney & Hurley.
J. WINNETT & CO.
GEORGE A. BROWN,
Assignee of Capen, Sprague & Co.
WILLIS W. STOVER,
Adm'r Est. of Louis Richardson.
E. LE ROY SWEETSER,
Executor of the Will of Mary A. Sweetser.

COMMONWEALTH OF MASSACHUSETTS,
Hampshire, ss:

NORTHAMPTON, MASS., —— —, 1909.

Then personally appeared John C. Hammond, one of the foregoing petitioners, and made oath that the allegations of the foregoing petition by him subscribed are true.

Before me. —— ——,
Notary Public.

7 **EXHIBIT B.**

UNITED STATES OF AMERICA:

District Court of the United States, District of Massachusetts.

No. 7811. Under Law of 1867.

In the Matter of ELBRIDGE L. SWEETSER, Bankrupt.

Answer to Petition of John C. Hammond to Have Assignees Required to Return Money Alleged to Have Been Unlawfully Taken from the Estate.

And now come the respondents and for answers to the petition above described deny that as assignees they ever received Two Thousand Six Hundred and sixty-one Dollars and twenty-five cents ($2661.25) and say that said amount was received by the respondent Kyle, attorney for them as assignees, who had rendered professional services and made advances for the estate for very many years.

And further answering, the respondents say that the respondent Kyle later retained in his hands Two thousand four hundred and sixty-six Dollars and thirty-two cents ($2466.32) from a payment of seventeen thousand four hundred and sixty-six Dollars and thirty-two cents ($17466.32) made to him as such attorney.

And further answering, the respondents say that the two amounts of Two thousand six hundred and sixty-one dollars and twenty-five cents ($2661.25) and Two thousand four hundred and sixty-six Dollars and thirty-two cents ($2466.32) were retained by the respondent Kyle in payment of services and disbursements made by him in the conduct of a prolonged litigation conducted by him for the benefit of the estate, said litigation covering proceedings in the Probate and Supreme Judicial Courts of this Commonwealth and in the District, Circuit and Supreme Courts of the United States, prosecuted in the effort to secure the estate of the bankrupt and for the benefit of the creditors.

And the respondents further answering deny that they have incurred any unnecessary expense, and say that all monies re-
8 ceived by them as assignees have been deposited and are now upon deposit in the Merchants National Bank of Boston, with the exception of the amount paid out to creditors in a dividend of 37% and in certain other items of expense properly made, all of which appears in their account duly filed.

WILLIAM B. H. DOWSE.
WARREN OZRO KYLE.

EXHIBIT C.

District Court of the United States, District of Massachusetts.

No. 7811. Under Law of 1867.

In the Matter of ELBRIDGE L. SWEETSER, Bankrupt.

This is a petition of creditors holding three-fourths of the claims proved and outstanding, alleging that the assignees, Dowse and Kyle, have wrongfully taken from the estate, and appropriated to their use, or to the use of said Kyle, two sums of money, one in October, 1907, stated as "the sum of upwards of $1500" and the other on February 1, 1908 stated as "the sum of upwards of $3000" and asking that they be required to return these amounts forthwith.

Considerable evidence, documentary and oral, has been introduced, but the portion bearing upon the present question may be very briefly stated. It is agreed that the statement of facts and figures given in the minutes of evidence and the briefs laid before the court may be taken as correct. The sums alleged to have been wrongfully diverted are now stated more specifically.

October, 1907	$1,786.44
February, 1908	2,466.32
	$4,252.76

The facts briefly stated are as follows: The body of assets of the estate of E. L. Sweetser in bankruptcy, in its later form, was a claim of the bankrupt's interest in a trust fund under the will of Solon O. Richardson. This claim was in litigation in various forms and in various courts of the Commonwealth and of the
9 United States for many years. In the autumn of 1907 it had been successfully established in favor of the estate in bankruptcy, and was ready for settlement.

On October 22, 1907, the trustee under the will of Richardson made a check to the order of W. B. H. Dowse and Warren O. Kyle, assignees of the estate of Elbridge L. Sweetser in bankruptcy, for $2661.25.

Mr. Kyle gave the trustee a receipt as follows:

BOSTON, *October* 22, 1907.

Received of William W. Whittredge, Trustee under the will of Solon O. Richardson Twenty six hundred sixty one 25/100 dollars ($2661.25) on account of income from trust fund under said will being E. L. Sweetser's interest, which by bankruptcy proceedings passed to the undersigned.

$2661.25.

WILLIAM B. H. DOWSE,
WARREN OZRO KYLE,
By WARREN O. KYLE,
Assignees in Bankruptcy of E. L. Sweetser,

Mr. Kyle endorsed the check with Mr. Dowse's name as well as his own, and deposited it in his personal account in the Bank of Commerce for collection. It was collected October 26, 1907, and Mr. Kyle's personal account was credited with the amount.

Mr. Kyle then sent the Register, on account of services..	$500.00

The brief of the petitioners' counsel notes

"The amount of this check was less than the fees earned by the Register, and the creditors make no complaint on account of the payment."

The brief also notes several payments for current expenses to which it makes no objection amounting to	374.81
The balance remaining to Mr. Kyle's personal credit would therefore be.....	1,786.44
	$2,661.25

Before the receipt and deposit of the first sum received from the Richardson trust fund, the attorney of the creditors wrote to the attorney of the assignees, calling attention to the banking provisions prescribed by § 5059 of U. S. Rev. Stats. and Rule 28.

10 About the end of January 1908, Mr. Kyle received from the trustee of the Richardson fund the sum of $17,466.32, as further payment of the amount due the estate in bankruptcy, and gave receipt, signing as before for both assignees. This was made up of the following checks, all dated February 1, 1908, and payable to the order of W. B. H. Dowse and Warren O. Kyle, assignees,

$12,000.00
36.59
353.00
5,076.73
$17,466.32

These checks were indorsed by Kyle for Dowse and himself assignees.

Kyle deposited the two small checks, $353. and $36.59 in his own personal account in the Bank of Commerce.

For the balance, $17,076.73 he took from the Bank of Commerce two certificates of deposit for $15,000 and $2,076.73 payable to W. B. H. Dowse and Warren O. Kyle, assignees. The certificate for $2,076.73 he shortly afterwards endorsed in the name of his co-assignee and himself, and deposited it in the Bank of Commerce in his individual account.

The sums deposited by Mr. Kyle to his own use from the second amount received from the Richardson are	$353.00
therefore	36.59
	2,076.73
	$2,466.32
To this add the amount claimed as diverted Oct., 1907	1,786.44
Amount ought to be returned	$4,252.76

Mr. Dowse had received no money. It does not appear that he knew Mr. Kyle had collected any, until early in March he was told that his co-assignee held a certificate of $15,000.00 payable to the joint order of the assignees. This certificate of $15,000.00 was thereupon endorsed by both assignees, and on March 4th,
11 deposited in the Merchants Nat'l Bank, an authorized depository. This endorsement appears to be Mr. Dowse's first connection with the collection and disposition of moneys. Mr. Kyle placed in his own bank the sums now sought to be recovered without co-operation of Mr. Dowse, by using Mr. Dowse's name in the signature of receipts and endorsements of checks.

With the subsequent disposition of the $15,000.00 the present petition is not concerned.

The sums with which the petition is concerned are treated by Mr. Kyle as follows:

In the Report of Assignees for month ending October 31, 1907, Evidence p. 92, is this item.

Cash paid on account of professional services and expenses incident to these proceedings in bankruptcy and litigation in pending suits $2,661.25

W. B. H. DOWSE,
WARREN OZRO KYLE,
Assignees.

By WARREN OZRO KYLE.

In the Report of Assignees for month ending Feb. 29-1908 Evidence p. 93 is this item:

Cash paid on account of professional services and expenses incident to these proceedings in bankruptcy and litigation in suits pending..... $2,466.32

W. B. H. DOWSE,
WARREN OZRO KYLE,
Assignees.

By WARREN OZRO KYLE.

In the Report of the Assignees of the condition of the estate, filed July 1-1908, evidence p. 101 the matter is treated thus:

"Of the total amount thus far received as stated above the sum of Two Thousand Six Hundred and Sixty-One and Twenty-five one hundredths Dollars on account of income of said fund was received in October of 1907, by the undersigned Warren O. Kyle and was retained by him for his necessary disbursements and on account of a reasonable compensation for his services as assignee and counsel for the assignees in litigation necessary to protect the interest of this estate, and in February of the present year a further sum of Seventeen Thousand Four Hundred and Sixty-six and
12 Thirty-two One hundredths Dollars was collected from said Trustee under the will of Solon O. Richardson by said Warren Ozro Kyle of which Two Thousand Four hundred and Sixty-six and Thirty-two one Hundredths Dollars was retained for necessary disbursements and on account of compensation as aforesaid."

It will be observed that the Report speaks of these sums as received and retained by Kyle, and that Mr. Dowse now and in subsequent reports and accounts signs and make- oath for himself.

In the Report of the Assignees of the condition of the estate filed Oct. 1-1908, Evidence p. 106, the joint amount $5,126.57 is entered as retained by Kyle "on account of services and expenses."

Finally in the Report of Collections, deposits and payments filed June 26-1909, Evidence p. 114, these sums are not included at all in Schedules A and B, but are both set forth in a supplementary schedule as follows:

"Cash received from W. W. Whittredge, Trustee, by Warren O. Kyle, assignee and attorney, acting for assignees in conduct of litigation and deposited on his own account under claim of right to meet expenses and disbursements of litigation and in payment of reasonable compensation."

I set out the last form of entry at length, as it seems to indicate an intention merely to use the deposits made by Mr. Kyle in his own bank as a fund from which to make approved payments, instead of having recourse to the prescribed depository. There is, of course, no justification for such a proceeding. I dare say this may have been done some times, perhaps often, where a responsible assignee, in a case involving no disputes and no expenses but the ordinary ones for clerk's fees, register's fees, printing, travel, etc., took the responsibility as a matter of conveninece, of using his own bank instead of the one prescribed. I have no recollection of any such case. I certainly never passed upon one, and should have passed upon one as I now pass upon this,—that such a course could not be justified.

But the present case is not even such a case as that. The sums deposited by Mr. Kyle in his own bank were, with the exception of the expenditures already specified as unobjectionable, taken as his own and spent as his own.

13 Mr. Dowse's position in the whole matter differs somewhat from Mr. Kyle's, and may well be considered here. The facts

appear to be that he received none of the money in dispute, and that he did not learn that any money had arrived until it had been disposed of by Mr. Kyle in the manner indicated. It does not appear that he had given Mr. Kyle any authority to act for him, or that he authorized or indeed recognized the taking of money by his co-assignee by way of compensation. In applying the measure of surveillance proper and capable of being exercised by a trustee over his associate every case must be decided by itself. I am unable to find that Mr. Dowse was sufficiently negligent to make himself liable to return money which he never got.

The answer of the assignees alleges, expressly as to the first sum received and by implication as to that diverted from the large (second) payment, that these sums never came to them as assignees, but were retained by Kyle as attorney in long litigation prosecuted for the benefit of the estate. This attempt to distinguish himself as assignee and as attorney will hardly avail Mr. Kyle. In the receipt of both sums he appeared as assignee, indeed as representing both assignees. The money was paid to him in no other capacity. Moreover, the distinction if established would be of no avail, for under the rule he could no more pay himself as attorney than as assignee without approval of the judges.

Mr. Kyle's main objection to the prayer that he be required to return forthwith the money alleged to have been improperly taken or retained is that he should have opportunity at this point to show that he has earned it.

He makes offer of proof of the services rendered and the expenses incurred by him as attorney for the assignees since the early part of 1901 and claims that a fair remuneration for said services would far exceed the amount retained by him. He claims that an order for return of money, if made at all, should not be made until the amount of said fees and expenses have been legally ascertained to be less than the amount retained.

He makes as his offer, a statement of the various phases of the case from 1901 to the present time, and of his important duties
14 and services in connection therewith. It is substantially a sketch of the history of the case for eight years in various courts, both of the United States and the Commonwealth. This statement will be found upon the Record, pp. 84-86, as an offer of proof, but it was objected to as being immaterial and incompetent.

The Register ruled the evidence offered to be inadmissible as having no bearing upon the present petition.

The rules are perfectly clear that no extraordinary payment can be made, no matter how fully earned, in any other way than by check countersigned by the Register or judge, and after two judges have passed upon it. And there has been shown me no case from which any modification of the strictness of the rule could be borrowed.

I therefore make the following Rulings and Findings:

Rulings.

I. It is the duty of an assignee receiving moneys belonging to the estate to deposit the same in some authorized depository. I find that Mr. Kyle, assignee in the Sweetser case, violated that duty by using his own unauthorized bank account for that purpose.

II. It is the duty of an assignee claiming compensation for services rendered to obtain, before taking the same, an order of court fixing the amount of the same and authorizing payment. I find that Mr. Kyle, the assignee, violated this duty by paying himself the sum of $4252.76 for services, without first obtaining the approval of court.

III. Mr. Kyle, assignee, violated his duty in both the above acts, by doing the same without obtaining authority from his co-assignee.

IV. An assignee having taken money unlawfully should be ordered to repay the same forthwith.

At the request of the respondents, I hereby certify and report to the Judge, all questions raised by the foregoing report.

Respectfully submitted,

S. L. THORNDIKE, *Register.*

15 EXHIBIT D.

District Court of the United States, District of Massachusetts.

In Bankruptcy. No. 7811 (Law 1867).

In the Matter of ELBRIDGE L. SWEETSER, Bankrupt.

On Petition of John C. Hammond and Other Creditors for an Order that Assignees Deposit in the Merchants National Bank Certain Funds Alleged to Belong to the Bankrupt Estate.

Opinion.

(February 11, 1910.)

DODGE, *J.:*

The petitioners are the owners or present holders of claims proved against the estate. The respondents are the two assignees of the estate.

As the result of long pending litigation finally determined by the decision of the U. S. Supreme Court in Hammond vs. Whittredge, 204 U. S. 538, affirming the judgment or decree of the Supreme Judicial Court of Massachusetts in Whittredge vs. Sweetser, 189 Mass. 45, the respondent Kyle received toward the satisfaction of said judgment $2661.25 in October, 1907, and $17,446.32 in January 1908, in all $20,107.57.

These payments were made by the Trustee under the will of Solon O. Richardson, against whom the judgment had been entered, in partial payment of the amount due from him. He delivered checks

aggregating the above amounts to the respondent Kyle, who gave receipts for them on behalf of his coassignee Dowse and himself, signing the receipt as follows:

WILLIAM B. H. DOWSE,
WARREN OZRO KYLE,
Assignees in Bankruptcy of E. L. Sweetser.
By WARREN O. KYLE.

Proceedings in this case are governed by the Bankruptcy Act of 1867 and by the General Orders of the Supreme Court in pursuance thereof. Sec. 17 of that Act requires an assignee as soon as may be after receiving any money belonging to an estate to deposit it
16 in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession. (Rev. Stats. Sec. 5059.) No. 28 of the General Orders referred to provides for the designation by the District Court of National Banks as depositories in which all moneys received by assignees shall be deposited, and that every assignee shall deposit all sums received by him on account of any bankrupt estate in one designated depository. It also provides that no money so deposited shall be drawn from such depository except upon a check or warrant signed by the Clerk of the Court, or by an assignee, and countersigned *signed* by the Judge or Register. These requirements have not been complied with in respect of all the money received by Kyle as above. $15,000 only has been so deposited. The remaining $5127.57 has never been so deposited. Kyle has paid $500 of it to the Register on account of fees due him and has used $374.81 of it in paying sundry current expenses in connection with the litigation. To the disposition made of this $874.81 the petitioners do not object. The remaining $4252.76 Kyle has deposited to his own personal account in a bank not designated as a depository. To the disposition made by him of this $4252.76 the petitioners do object, and they ask that he be ordered to deposit it in the same account with the $15,000.

In their joint answer to the petition, the assignees deny that the above amount of $5127.57 was received by them "as assignees," and allege that this amount was received by Kyle as their attorney "who had rendered professional services and made advances for the estate for very many years." It was retained by Kyle, according to the allegations of the answer, "in payments of services and disbursements made by him in the conduct of prolonged litigation conducted by him for the benefit of the estate, said litigation covering proceedings in the Probate and Supreme Courts of this Commonwealth and in District, Circuit and Supreme Courts of the United States, prosecuted in the effort to secure the estate of the bankrupt and for the benefit of the creditors." The answer goes on to deny that any unnecessary expense has been incurred and to allege that all
17 moneys received by them "as assignees" have been duly deposited. It alleges no other reason against making of the order prayed for.

The petition and answer, having been filed in Court, were referred to the Register for his action thereon. After a hearing, he

has found the facts and has certified and reported, at the respondents' request, all questions thereby raised. In his finding of facts are included further details in connection with the facts above recited, but these, for the most part, do not seem essentially important upon the questions to be decided. The evidence before him accompanies the report.

Mr. Kyle offered before the Register to prove that, as counsel for the assignees, he had rendered services and incurred expenses at various times, since the early part of 1901, in various proceedings relating to the estate before State or Federal Courts, and that a fair remuneration and reimbursement to him therefor would exceed the $4252.76 here in question.

The Register ruled the evidence offered to be inadmissible, as having no bearing upon the petition before him. He further ruled and found, among other things, as follows:

(1) "It is the duty of an Assignee receiving moneys belonging to the estate to deposit the same in some authorized depository. I find that Mr. Kyle, assignee in the Sweetser case, violated that duty by using his own unauthorized bank account for that purpose."

(2) "It is the duty of an assignee claiming compensation for services rendered to obtain, before taking the same, an order of court fixing the amount of the same and authorizing payment. I find that Mr. Kyle, the assignee, violated this duty by paying himself the sum of $4252.76 for services, without first obtaining the approval of the court."

(4) "An assignee having taken money unlawfully should be ordered to pay the same forthwith."

I am obliged to hold that the Register was right in excluding the evidence offered and right also in making the above rulings and findings.

I find no reason to believe that the Bankrupt Act of 1867 debars an assignee from rendering professional services to the estate as counsel, or from compensation for such services, if he renders
18 them, in addition to the compensation prescribed by the Act for the performance of those duties imposed by the Act upon an assignee as such. Re Welge, 1 F. R. 216, Blythe vs. Thomas, 45 F. R. 784, 793, affirmed on appeal 55 F. R. 961. Whether a trustee in Bankruptcy under the present act can, in any event, become entitled to such compensation is a more doubtful question. See Collier, Bankruptcy, 7th Ed. 693. Remington, Bankruptcy Sec. 2059. In this District he certainly cannot do so without leave to act as counsel previously obtained, as provided by local Rule 10.

An assignee under the Act of 1867 is, however, required to obtain from the Court by special application and hearing thereon after notice to creditors, the allowance of the amount to be paid out of the estate for services of counsel, whether rendered by him or some one not an assignee, before he can charge the estate with the amount in his accounts. Re Noyes, F. C. 10371, Ex parte Whitcomb—Re Colwell, 2 Lowell, 523, F. C. 17, 529. Such a payment does not become a proper charge against the estate unless previously allowed to the assignee under Sec. 28 of the Act (Rev. Stats. Secs. 5099, 5100)

and the amendment to General Order 30, (93 U. S. VIII)—which, in permitting the District Judge to make extra allowances, requires that they may be made by and with the advice and concurrence of the Circuit Justice or Judge. I do not see how any payment from funds of the estate in his hands can be held to have been lawfully made by an assignee unless he has the right when he makes it to charge it against the estate in his account. If he makes a payment without having it allowed, he incurs a risk of having to re-store the amount to the estate. And if without previous allowance he cannot lawfully pay out money of the estate for services of other counsel employed by him as assignee, still less can he take it in payment for his own professional services until the Court has approved the payment.

Pending the question of allowance, upon the decision whereof the assignee's right to make the payment depends, I cannot doubt that Rev. Stats. 5059 requires any money of the estate with which he proposes to make it to be on deposit as there provided.

19 The respondents contend that the payment to Mr. Kyle did not immediately make the money paid him funds of the estate in their hands as assignees, that it did not become funds of the estate until turned over by him as counsel for the estate to the joint control of both assignees, and that before it was so turned over he had the right, as counsel, to deduct his necessary disbursements in connection with the litigation and reasonable compensation for his services.

But it seems to me clear, as it did to the Register, that an assignee who undertakes to act as counsel for the estate under his charge cannot thus distinguish between himself as counsel and himself as assignee. In undertaking to act as counsel for the estate, he must be regarded as having consented that all claims by him for reimbursement or compensation as counsel should be determined under the above provisions of the Bankruptcy Act and the General Orders. Whatever might have been the rights of counsel not also charged with the duties of assignee to retain the proceeds of the judgment or pay himself therefrom, no resort by him to such methods of obtaining compensation or reimbursement can be permitted, because in the controversy involved he would become one of the parties opposing his own claim. He must be taken to have waived in advance all right to resort to any such method of redress.

The requirements of the Act and General Orders, already referred to, which oblige an assignee to obtain from the Court the allowance of all charges for his own services and disbursements, I must also regard as making it impossible to say that the word "retain" as used in Rev. Stats. Sec. 5099, implies any permission to the assignee to keep money of the estate out of any designated depository. What must be intended is, that upon the settlement of his own account, and upon payment therefrom of all other charges, the balance allowed to him of the funds on deposit will belong to him.

It follows that it is wholly immaterial to the questions before the Register whether Mr. Kyle has or has not made disbursements and rendered services as counsel in connection with the litigation referred, or to what amount, if to any amount. The $4252.76 having been

received by him in the manner stated, as is not denied, became at once money belonging to the estate which, under Rev. Stats. § 5059, he was bound to deposit in the same designated depository as that in which the $15000 has been deposited. The petitioners are entitled to have the order made, for which they ask.

I find no reason in what appears for charging Mr. Kyle with any bad faith in what he has done, or with any design to obtain an advantage to which he did not believe himself entitled. He has stated at the hearing that he was ready to comply with any order which might be made upon the petition. During the litigation referred to, which, upon more than one previous occasion, has been brought under the notice of the Court in connection with questions from time to time raised in this case, it may well be supposed that he has been obliged to make advances at the cost of considerable inconvenience to himself, and to expend a considerable amount of time and labor. In a case involving no controversy between himself and any creditor of the estate, the course pursued regarding the money here in question, though irregular, might perhaps have been acquiesced in as depriving no one of any substantial right. There has been such acquiescence, as stated above, in his payment of $874.81 out of this money to the Register and for sundry expenses. Against objection such as is here made, it is impossible for the Court to approve any disposition of the money other than that prescribed by law.

The Register has made another ruling and finding which remains to be considered. This is to the effect that Mr. Kyle violated his duty by depositing this money and by paying it to himself as stated, without obtaining authority from his co-assignee. The Register also states that he is unable to find "that Mr. Dowse was sufficiently negligent to make himself liable to return money which he never got." Mr. Kyle's disposition of the money may have been without Mr. Dowse's authority, approval or knowledge at the time, but the answer to the petition, which undertakes to justify what Mr. Kyle did upon the grounds stated above, is in the name of and is signed by both assignees. Under these circumstances, I do not see why any order to be made should not be made against both of them.

21 *Respondents' Demurrer.*

(Filed March 12, 1910.)

The respondents by protestation, not confessing or acknowledging all or any of the matters or things in the said petitioners' petition contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said petition, and for causes of demurrer show:

1. That the said petitioners have not by their said petition made such a case as entitles them in this court to any relief as to the matters contained in said petition or touching any of the matters therein complained of.

2. Because the rulings of the District Court set forth and complained of were entirely correct.

3. Because it clearly appears by examination of the exhibits annexed to the petition aforesaid, and especially by the opinion of the United States District Court, a copy of which is annexed to the petition, that the rulings of the court were in accordance with the statutes of the United States, the rules of court and the decisions of the United States courts applicable thereto.

HOLLIS R. BAILEY,
Solicitor for the Respondents, John C. Hammond et al.

I certify that the foregoing demurrer is, in my opinion, well founded in point of law, and the same is not interposed for delay.

HOLLIS R. BAILEY,
Solicitor for Respondents.

Sworn to before me this eleventh day of March, A. D. 1910.

[SEAL.] GEORGE W. MATHEWS,
Notary Public.

22 COMMONWEALTH OF MASSACHUSETTS,
Hampshire, ss:

JUNE 7, 1910.

I, John C. Hammond, one of the respondents in the above-entitled proceeding, being duly sworn, make oath and say that the foregoing demurrer is not interposed for delay.

JOHN C. HAMMOND.

Subscribed and sworn to before me this seventh day of June, A. D. 1910.

[SEAL.] THOMAS J. HAMMOND,
Notary Public.

23 *Transcript of Record of the Circuit Court.*

(Filed in Circuit Court of Appeals Jan. 20, 1911.)

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Wednesday, the twenty-third day of February, the last Tuesday of said February being a legal holiday, in the year of our Lord one thousand nine hundred and ten.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 690. Equity Docket.

WARREN OZRO KYLE and W. B. H. DOWSE, Petitioners,
In re ELBRIDGE L. SWEETSER, Bankrupt.

The Petition to Revise Rulings in Bankruptcy in this cause is filed in the clerk's office on the twenty-fifth day of February,
24 A. D. 1910, and is duly entered at the present February Term of this Court, A. D. 1910, and is as follows:

Petition of Warren Ozro Kyle and W. B. H. Dowse to Revise Certain Rulings of the District Court.

(Filed Feb. 25, 1910.)

(MEMORANDUM.—The Petition of Warren Ozro Kyle and W. B. H. Dowse to Revise Certain Rulings of the District Court, as printed in this Transcript of Record, beginning on page 1, is here inserted Charles K. Darling, Clerk.)

On the twelfth day of March, A. D. 1910, the following Demurrer is filed by respondents:

Respondents' Demurrer.

(Filed March 13, 1910.)

(MEMORANDUM.—The Respondents' Demurrer, as printed in this Transcript of Record, beginning on page 21, is here inserted. Charles K. Darling, Clerk.)

On the twentieth day of June, A. D. 1910, this cause is set down for hearing on petition and demurrer and is fully heard by the Court, the Honorable Francis C. Lowell, Circuit Judge, sitting, and on the eighth day of September, A. D. 1910, after due consideration

thereon had, the Opinion of the Court is announced, sustaining the demurrer and dismissing the petition with costs.

On the twenty-seventh day of September, A. D. 1910, the following Final Decree is entered:

25 *Final Decree.*

Sept. 27, 1910.

LOWELL, *J.*: A petition having been filed in this court by Warren O. Kyle and William B. H. Dowse, assignees in bankruptcy of Elbridge L. Sweetser, bankrupt, on the 25th day of February, 1910, asking for revision of certain so called rulings contained in the opinion of the District Judge of the District Court of the United States for the District of Massachusetts in bankruptcy, and the respondents having appeared and filed a demurrer to said petition, and the case having been regularly heard upon said petition and demurrer, Warren O. Kyle, Esq., appearing for the petitioners, and Hollis R. Bailey, Esq., for the respondents, and this court being satisfied that no error was committed by the court below, It is ordered that the respondents' demurrer be, and the same hereby is, sustained, and that the petition for a revision be, and the same hereby is, dismissed with costs, taxed by the clerk in the sum of twenty dollars.

Witness the Honorable Francis C. Lowell, Judge of the said Circuit Court, at Boston, in said District, on the twenty-seventh day of September, 1910.

By the Court:

CHARLES K. DARLING, *Clerk.*

From the foregoing Final Decree, the petitioners claim an appeal to the United States Circuit Court of Appeals for the First Circuit and give good and sufficient security that they will prosecute their appeal to effect and answer all costs if they fail to make their appeal good and said appeal is allowed accordingly.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

26 *Opinion of the Court.*

September 8, 1910.

LOWELL, *J.*:

This is a case arising under the Bankrupt Act of 1867. Certain creditors of the estate of the bankrupt Sweetser filed a petition in the District Court representing that Kyle and Dowse, assignees of the estate, had received from the estate certain sums of money, part of which they had not deposited in a duly designated bank; but a part of the money so received had been taken by Kyle to his own use. The creditors prayed "that said assignees may be required

forthwith to return said money wrongfully taken by them as aforesaid, and for such other relief in the premises as may seem to the court reasonable and proper." To this the assignees filed an answer stating in general that the sums taken or retained by Kyle were retained in payment of services and disbursements made by him in the conduct of the litigation which produced the money for the estate; and further that all moneys received by them as assignees are now upon deposit in a statutory repository.

The petition and answer appear to have been sent to the register in accordance with the usual procedure. In his report he says, "The facts briefly stated are as follows:" These facts, with the register's opinion on the questions presented by the petitioners, are contained in his report, and so far as that report contains statements of fact these may be taken to be the register's findings. At the close of his report, after an expression of opinion upon the questions involved, he made the following "Rulings and Findings: Rulings"

"I. It is the duty of an assignee receiving moneys belonging to the estate to deposit the same in some authorized depository. I find
that Mr. Kyle, assignee in the Sweetser case, violated that
27 duty by using his own unauthorized bank account for that purpose.

"II. It is the duty of an assignee claiming compensation for services rendered to obtain, before taking the same, an order of court fixing the amount of the same and authorizing payment. I find that Mr. Kyle, the assignee, violated this duty by paying himself the sum of $4252.76 for services, without first obtaining the approval of the court.

"III. Mr. Kyle, assignee, violated his duty in both the above acts, by doing the same without obtaining authority from his co-assignee.

"IV. An assignee having taken money unlawfully should be ordered to repay the same forthwith." No further findings appear. At the Respondents' request, the learned register certified and reported to the District Judge "all questions raised by the foregoing report."

The learned judge of the District Court filed an opinion setting out the facts as follows:

"As the result of long pending litigation finally determined by the decision of the U. S. Supreme Court in Hammond vs. Whittredge, 204 U. S. 538, affirming the judgment or decree of the Supreme Judicial Court of Massachusetts in Whittredge vs. Sweetser, 189 Mass. 45, the respondent Kyle received toward the satisfaction of said judgment $2661.25 in October, 1907, and $17,446.32 in January, 1908, in all $20,107.57.

These payments were made by the Trustee under the will of Solon O. Richardson, against whom the judgment had been entered, in partial payment of the amount due from him. He delivered checks aggregating the above amounts to the respondent Kyle, who gave
receipts for them in behalf of his co-assignee Dowse and him-
28 self, signing the receipt as follows: William B. H. Dowse, Warren Ozro Kyle, Assignees in Bankruptcy of E. L. Sweetzer, By Warren O. Kyle.

Proceedings in this case are governed by the Bankruptcy Act of 1867 and by the General Orders of the Supreme Court in pursuance thereof. Sec. 17 of that Act requires an assignee as soon as may be after receiving any money belonging to an estate to deposit it in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession. (Rev. Stats. Sec. 5059.) No. 28 of the General Orders referred to provides for the designation by the District Court of National Banks as depositories in which all moneys received by assignees shall be deposited, and that every assignee shall deposit all sums received by him on account of any bankrupt estate in one designated depository. It also provides that no money so deposited shall be drawn from such depository except upon a check or warrant signed by the Clerk of the Court, or by an assignee, and countersigned by the Judge or Register. These requirements have not been complied with in respect of all the money received by Kyle as above. $15,000 only has been so deposited The remaining $5127.57 has never been so deposited. Kyle has paid $500 of it to the Register on account of fees due him and has used $374.81 of it in paying sundry current expenses in connection with the litigation. To the disposition made of this $874.81 the petitioners do not object. The remaining $4252.76 Kyle has deposited to his own personal account in a bank not designated as a depository. To the disposition made by him of this $4252.76 the petitioners do object, and they ask that he be ordered to deposit it in the same account with the $15,000.

29 In their joint answer to the petition, the assignees deny that the above amount of $5127.57 was received by them "as assignees," and allege that this amount was received by Kyle as their attorney "who had rendered professional services and made advances for the estate for very many years." It was retained by Kyle, according to the allegations of the answer, "in payments of services and disbursements made by him in the conduct of prolonged litigation conducted by him for the benefit of the estate, said litigation covering proceedings in the Probate and Supreme Courts of this Commonwealth and in District, Circuit and Supreme Courts of the United States prosecuted in the effort to secure the estate of the bankrupt and for the benefit of the creditors." The answer goes on to deny that any unnecessary expense has been incurred and to allege that all moneys received by them "as Assignees" have been duly deposited. It alleges no other reason against making of the order prayed for.

The petition and answer, having been filed in Court, were referred to the Register for his action thereon. After a hearing, he has found the facts and has certified and reported, at the respondents' request, all questions thereby raised. In his finding of facts are included further details in connection with the facts above recited, but these, for the most part, do not seem essentially important upon the questions to be decided. The evidence before him accompanies the report.

Mr. Kyle offered before the Register to prove that, as counsel for the assignees, he had rendered services and incurred expenses at various times, since the early part of 1901, in various proceedings relat-

ing to the estate before State or Federal Courts, and that a fair remuneration and reimbursement to him therefor would exceed the $4252.76 here in question."

30 The learned judge then went on to render his opinion on the questions presented, and agreed with the register except that he held that the order for the return of the money, which order was mentioned in the register's opinion but was never made, should apply to Mr. Dowse as well as to Mr. Kyle.

Messrs. Dowse and Kyle thereupon filed a petition for revision in this Court against the creditors above mentioned in which petition they assert that the District Judge made rulings in his opinion on questions certified by the register, and that they are "aggrieved by the following rulings of the District Court:

'It follows that it is wholly immaterial to the questions before the Register whether Mr. Kyle has or had not made disbursements and rendered services as counsel in connection with the litigation referred, or to what amount, if to any amount. The $4252.76 having been received by him in the manner stated, as is not denied, became at once money belonging to the estate which under Rev. Stats. § 5059, he was bound to deposit in the same designated depository as that in which the $15,000 has been deposited. The petitioners are entitled to have the order made, for which they ask.'

'Mr. Kyle's disposition of the money may have been without Mr. Dowse's authority, approval or knowledge at the time, but the answer to the petition, which undertakes to justify what Mr. Kyle did upon the grounds stated above, is in the name of and is signed by both assignees. Under these circumstances, I do not see why any order to be made should not be made against both of them.'

31 Wherefore your petitioners pray that said rulings may be revised and set aside and held for naught, and that by order of this court it be decreed that your petitioners have a right to show what services had been rendered by respondent Kyle as solicitor and counsel in proceedings in equity to create, secure and protect the fund paid over to him, as stated in 'Exhibit D,' and that the evidence offered on this point was relevant and material; that your petitioners be permitted to establish the amount and value of the services rendered by your petitioner Warren Ozro Kyle as solicitor and counsel in creating, preserving and recovering the fund paid into his hands as the result of long and arduous litigation; that it be decreed that the amount so ascertained was and is rightfully retained out of said fund and is the property of your petitioner Warren Ozro Kyle; that it be decreed that no order should be made against your petitioner William B. H. Dowse in any event to deposit in any bank to the credit of the bankrupt estate or pay into court the whole or any part of said amount deducted by your petitioner Warren Ozro Kyle on account of his services and expenses as solicitor and counsel in relation to said fund as aforesaid; and that your petitioners be given such other relief as shall be proper."

To this petition the respondent creditors demurred.

From the matters above stated it appears that this court is asked to revise the proceedings in the District Court in the absence of any

order made therein, and especially to revise certain alleged rulings of the District Court which are rather expressions occurring in the course of the opinion of the learned district judge. This is in effect an appellate proceeding, with nothing but expressions of opinion to appeal from. Under these circumstances, appellate proceed-
32 ings are ordinarily out of the question, and should be immediately dismissed. Rev. Stat. Sec. 4986, provides, however, that this court "shall have a general superintendence and jurisdiction of all cases and questions arising in the District Court * * * when sitting as a court of bankruptcy," and counsel on both sides are agreed that the section authorizes this court to pronounce upon "cases and questions," before the District Court has taken final or even interlocutory action thereon. That the laws should be thus construed embarrasses this court, sitting as a court of appeal, but its exercise of jurisdiction under the Bankruptcy Act of 1867 has become almost obsolete, and further comment is superfluous. See In re Sweetser, 168 Fed. 1018, also 157 Fed. 567.

I hold that the learned judge of the District Court was right in ruling that Mr. Kyle must be deemed to have taken the money received by him as assignee in bankruptcy. Mr. Kyle contends that in obtaining the money he was in effect acting merely as the assignee's counsel, and not as assignee; and that as counsel he had the right to retain the money in question in payment of his legal services. But if Mr. Kyle had the right and the desire to retain this money in his office as attorney, without regard to his office as assignee, he should, at least, have made his receipt the unequivocal expression of his intention. The receipt must be given its natural meaning, which imports a receipt by the assignees rather than by their counsel, and the statute requires explicitly that every assignee shall deposit all sums received on account of any bankrupt estate in a designated depository. In the receipt which he gave Mr. Kyle declared that this money was so received, and therefore, at the least, he should have passed it through the statutory depository. This has not been done, and it must be done.

33 The learned register and the learned district judge appear also to have been of the opinion that any payment by the assignees to Mr. Kyle would be unlawful without an order of the court of bankruptcy previously obtained. I do not find it necessary to determine as a matter of law that assignees in bankruptcy, having properly deposited the money they have received, must in all cases be compelled to refund a payment made to one of their number for legal services unless an order of court for the payment has theretofore been actually made. If such a payment were accompanied by an account praying allowance of the payment, the court of bankruptcy might perhaps have a discretion not to require a formal refunding to the estate, if it was satisfied that the payment was otherwise proper. Considering the illegal act already committed in this case, I see no reason to overrule an expression of opinion by the District Court applicable only to circumstances which may never arise.

Mr. Dowse received no part of the money, but in these legal pro-

ceedings he has definitely joined Mr. Kyle. Although the name of his counsel appears upon the briefs filed, no argument has been urged to distinguish his case from that of Mr. Kyle.

The creditors herein urge that interest should be allowed upon the money which the court of bankruptcy will direct Mr. Kyle to deposit as moneys of the bankrupt estate. The learned judge has found "No reason in what appears to charge Mr. Kyle with any bad faith in what he has done," and on the question of interest neither the learned register nor the learned judge has even expressed an opinion. Perhaps they will order the payment of interest and perhaps they will not. Even if it be true that under Rev. Stat. Sec. 4986, appellate proceedings may be based upon an expression of opinion and upon so-called rulings which have
34 not resulted in binding anyone, yet I cannot think that this appellate jurisdiction extends to correct that which has never yet entered into the consideration of the District Court. At some time and in some manner Mr. Kyle may be entitled to compensation for his legal services rendered to the estate. In fixing this compensation, the District Court will doubtless take into consideration Mr. Kyle's unlawful act as assignee. It is the respondents in this proceeding who urge this correction of the supposed future action of the District Court, and the respondents are not petitioners for the exercise of this court's superintendent jurisdiction. In accordance with its opinion on file, the District Court should order the assignees to pay into the statutory depository the sum retained by Mr. Kyle. The respondents' demurrer is sustained and the petition is dismissed with costs.

35 *Petition for Appeal.*

(Filed Dec. 3, 1910.)

The petitioners being aggrieved by the decree herein made and entered the twenty-seventh day of September, A. D. 1910, hereby appeal from said decree to the United States Circuit Court of Appeals for the First Circuit, and pray that this appeal may be allowed.

WARREN OZRO KYLE AND
W. B. H. DOWSE,
Assignees in Bankruptcy of Elbridge L. Sweetser,
By WARREN OZRO KYLE, *Pro Se.*
FRED JOY,
Solicitor for W. B. H. Dowse.

Assignment of Errors.

(Filed Dec. 3, 1910.)

I. The Court erred in sustaining the demurrer and dismissing the petition.

II. The Court erred in ruling that the District Court should order

the assignee to pay into the statutory depository the sums retained by the petitioner, Kyle, for his services as solicitor and counsel in creating, preserving and recovering the fund.

III. The Court erred in refusing to rule as requested by the petitioners that the petitioners have a right to show what services had been rendered by the petitioner, Kyle, as solicitor and counsel
36 in proceedings in equity to create, procure and protect the fund paid over to him.

IV. The Court erred in refusing to rule as requested by the petitioners that no order should be made against the petitioner, William B. H. Dowse, in any event to deposit in any bank to the credit of the bankrupt estate or pay into court the whole or any part of the amount deducted by the petitioner Kyle on account of his services and expenses as solicitor and counsel in relation to said fund.

V. The Court erred in ruling that the petitioner Kyle must be deemed to have taken the money received by him as assignee in bankruptcy.

VI. The Court erred in refusing to revise and set aside the rulings of the District Court in accordance with the prayer of the petition.

VII. The Court erred in refusing to rule as requested by the petitioners that the petitioner Kyle had a lien on the fund for his service in recovering the same, and that no order could be made against him until it had been ascertained after hearing upon the evidence offered what if any sum had been so retained in excess of the amount and value of the services as solicitor and counsel rendered by the petitioner Kyle in preserving and recovering the fund paid into his hands as the result of long and arduous litigation.

Respectfully submitted,

WARREN OZRO KYLE AND
W. B. H. DOWSE,
Assignees in Bankruptcy of E. L. Sweetser,
By WARREN OZRO KYLE, *Pro Se.*
W. B. H. DOWSE,
By His Solicitor, FRED JOY.

37 Circuit Court of the United States, District of Massachusetts.

In Equity.

No. 690.

WARREN OZRO KYLE and W. B. H. DOWSE, Petitioners.

In re ELBRIDGE L. SWEETZER, Bankrupt, No. 7811, in Bankruptcy, Under Law of 1867.

Opinion of the Court.

December 22, 1910.

LOWELL, *J.*:

These were proceedings under the Bankruptcy Act of 1867. The assignees filed a petition in this court to revise the rulings of the

District Court, which held them liable to the bankrupt estate for certain sums of money. The court dismissed the assignees' petition, and they have in due form sought the allowance of an appeal from this court to the Circuit Court of Appeals. The respondents object to the allowance of the appeal on the ground that, under the circumstances stated, no appeal lies from the Circuit Court to the Circuit Court of Appeals, the decision of the Circuit Court being final. The point of law involved in the decision of the District Court and of this court concerning the assignees' liability to the bankrupt estate is important and doubtful. To prevail in their objection, the respondents must persuade this court of two propositions:—

First, that the petitioners have no right to the appeal which they seek; second, that this court, if so persuaded, should refuse to allow the appeal.

I. If this court was to pass generally upon the petitioners' right of appeal, it would probably decide that none exists. The Court
38 of Appeals for this Circuit appears to have held thus in Huntington v. Saunders, 72 Fed. 10. That the decision in Huntington v. Saunders is against them in the case at bar the petitioners do not seriously dispute, but they suggest that the decision has been in effect overruled by later decisions of the Supreme Court. I am unable to find any conflict between these cases and Huntington v. Saunders. If the question was before the court under ordinary conditions, I should hold that the petitioners had no right to an appeal.

II. To refuse allowance, this court must be persuaded, not only that the Circuit Court of Appeals is without jurisdiction of this appeal, but also that the Circuit Court should pass upon the limits of that jurisdiction. No case has been cited in argument where this court has refused to allow an appeal for want of jurisdiction thereof in the Circuit Court of Appeals. Generally, at least the delimitation of its own jurisdiction has been left to the appellate court itself, and, under ordinary conditions, there it belongs. Convenience makes for this practice. If an appeal is allowed where the appellate court is without jurisdiction thereof, the respondent may move the appellate court to dismiss the appeal for want of jurisdiction. If, on the other hand, the appeal is denied where it should have been allowed, the appellant must seek a writ of mandamus from the appellate court directing the allowance. The former proceeding is the less cumbrous method of deciding the question raised.

Without holding that the rule above stated is of universal application, I hold that in the case at bar the appeal should be allowed.

39 *Bond on Appeal.*

(Filed and Approved Dec. 27, 1910.)

Know all Men by these Presents, That we, Warren Ozro Kyle and William B. H. Dowse, Assignees in Bankruptcy of Elbridge L. Sweetser, as principals, and Fred Joy, of Winchester and William A. Hayes, 2d, of Cambridge, in the County of Middlesex and Com-

monwealth of Massachusetts, as sureties, are held and firmly bound unto John C. Hammond, of Northampton, in the County of Hampshire and Commonwealth of Massachusetts, in the full and just sum of two hundred dollars to be paid to the said John C. Hammond or his certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of December, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts in a suit in equity depending in said Court between Warren Ozro Kyle and W. B. H. Dowse, petitioners, and John C. Hammond, respondent, a decree was entered against the said Warren Ozro Kyle and W. B. H. Dowse and the said Warren Ozro Kyle and W. B. H. Dowse having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said John C. Hammond citing and admonishing him to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of January, A. D. 1911.

Now, the condition of the above obligation is such, That if the said Warren Ozro Kyle and W. B. H. Dowse shall prosecute their appeal to effect, and answer all costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

WARREN OZRO KYLE. [SEAL.]
WILLIAM B. H. DOWSE. [SEAL.]
FRED JOY. [SEAL.]
WILLIAM A. HAYES, 2D. [SEAL.]

Approved:

FRANCIS C. LOWELL,
U. S. Circ. Judge.

40 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to John C. Hammond, of Northampton, in the County of Hampshire and Commonwealth of Massachusetts; James A. Tirrell, assignee of Magee Furnace Company, Dean, Foster & Co., Merrick Thread Co., Henry W. Dutton & Son, Judson A. Rockwood, A. E. Atwood, Stickney & Hurley; J. Winnett & Co.; George A. Brown, assignee of Capen, Sprague & Co.; Willis W. Stover, Adm'r Est. of Louis Richardson, and E. Le Roy Sweetser, executor of the Will of Mary A. Sweetser, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the

city of Boston, Massachusetts, on the* twentieth day of January next, pursuant to an Appeal duly obtained from a decree of the † Circuit Court of the United States for the District of Massachusetts wherein Warren Ozro Kyle and William B. H. Dowse, Petitioners *In re* Elbridge L. Sweetser, Bankrupt, are appellants and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis C. Lowell, Judge of the Circuit Court of the United States for the District of Massachusetts this 28th day of December, in the year of our Lord one thousand nine hundred and ten.

FRANCIS C. LOWELL,
U. S. Circuit Judge.

* Not exceeding 30 days from the day of signing.
† Name of Court in which the Decree is entered.

(Over.)

41 *Acknowledgment of Service on Citation on Appeal.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

DECEMBER 30, 1910.

We hereby accept service of the within citation.

JOHN C. HAMMOND,
By His Att'y, HOLLIS R. BAILEY.
JAMES A. TIRRELL,
Assignee of Magee Furnace Company, Dean, Foster & Co., Merrick Thread Co., Henry W. Dutton & Son, Judson A. Rockwood.
A. E. ATWOOD, STICKNEY AND HURLEY,
By His Att'y, HOLLIS R. BAILEY.
J. WINNETT & CO.,
By Their Att'y, HOLLIS R. BAILEY.
GEORGE A. BROWN,
Assignee of Capen, Sprague & Co.
WILLIS W. STOVER,
Adm'r Est. of Louis Richardson,
E. LE ROY SWEETSER,
Executor of the Will of Mary A. Sweetser,
By Their Att'y, HOLLIS R. BAILEY.

42 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit,

certify that the foregoing is a true copy of the record and proceedings in the cause in equity entitled, Warren Ozro Kyle and W. B. H. Dowse, Petitioners, *In re* Elbridge L. Sweetser, Bankrupt, in said Circuit Court determined, the Opinion of the Court of September 8, 1910, the Petition for Appeal, the Assignment of errors, the Opinion of the Court of December 22, 1910, the Bond on Appeal, and also the original Citation issued upon the appeal of the petitioners in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this 20th day of January, A. D. 1911.

[SEAL.] CHARLES K. DARLING, *Clerk.*

43 United States Circuit Court of Appeals for the First Circuit.

No. 917.

WARREN OZRO KYLE ET AL., Petitioners, Appellants,
v.
JOHN C. HAMMOND et al., Appellees.

Appellees' Motion to Dismiss for Want of Jurisdiction.

(Filed January 24, 1911.)

And now come the appellees, John C. Hammond and others, and, not waiving their special appearance, move that the case be dismissed for want of jurisdiction, with costs, interest, and damages to appellees as provided in Rule 30.

The grounds for this motion are stated in the accompanying brief.

JOHN C. HAMMOND ET AL.,
Appellees,
By HOLLIS R. BAILEY,
Their Solicitor.

Order of Court.

January 24, 1911.

COLT and PUTNAM, *J. J.:*

Upon the filing of a motion to dismiss for want of jurisdiction, and brief in support thereof, by the appellees, It is ordered that said motion be submitted on briefs, brief for the appellants to be filed by February 7, 1911.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

44 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 917.

WARREN OZRO KYLE ET AL., Petitioners, Appellants,
v.
JOHN C. HAMMOND et al., Respondents, Appellees.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Motion to Dismiss.

Before Colt, Putnam and Aldrich, J. J.

Opinion of the Court.

February 21, 1911.

PUTNAM, *J.:*

This case arises under the statute in bankruptcy ordinarily known as that of 1867. There was a proceeding in the District Court which came before the Circuit Court on a revisory petition under that act. It is easier and simpler to describe this proceeding by reference to Wiswall v. Campbell, 93 U. S. 347, than by any attempt to give an abstract of the statutes in reference thereto. It was there held that, as the law existed in 1867, the proceding stopped in the Circuit Court and could not be taken to the Supreme Court. This rule was applied under exactly the same circumstances we have here,
45 and in the present condition of the law, with reference to the act of 1867 by this court in Huntington v. Saunders, 72 Fed. Rep. 10, and 74 Fed. Rep. 394. In that case, which was decided by a full Court of Appeals on February 3, 1896, it was held, under the same circumstances which exist here, that the Circuit Court of Appeals had no jurisdiction to revise the action of the Circuit Court.

The court in the latter case especially noted the peculiar phraseology of section 6 of the act of March 3, 1891, establishing this court, which gave this court a general right of review "unless otherwise provided by law." The full effect of those words has never been clearly understood, but what might be supposed to illustrate some phases of their efficiency was removed in the cases relied on by the appellants here, namely, Lau Ow Bew v. United States, 144 U. S. 47, Hubbard v. Sobey, 146 U. S. 56, and The Paquete Habana, 175 U. S. 677, 680; and especially in North American Company v. Smith, 93 Fed. Rep. 7, which last case referred to appeals in admiralty suits relating to sums less than fifty dollars. Some of these cases were decided before Huntington v. Saunders, and some later. The appellants, however, overlook the fact that none of the decisions cited by them touch the case at bar because the act of

June 7, 1878, 20 Stat. 99, which repealed the Bankruptcy Act of 1867, after providing that it should take effect on the first day of September, 1878, added as follows:

"In any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of, in the same manner as if said acts had not been repealed."

This reserved all such rights as are involved in this petition, and were involved in Wiswall v. Campbell; yet, while it saved them, it directed the same proceedings as though there had been no repeal. In this particular, the subject-matter of the appeal, including the case at bar, is entirely taken out of any other legislation of a general character, including the statute of March 3, 1891, establishing this court.

46 We might have brought this present appeal to the reductio ad absurdum, because, if, as the appellants claim, the act establishing the Court of Appeals is applicable, its effect would have been to have required a direct appeal from the District Court to this court, and the appeal provided by the Bankruptcy Statute of 1867 from the District Court to the Circuit Court would have disappeared. Consequently the only effect would have been to have directed on this appeal that the appeal to the Circuit Court be dismissed; but, as, of course, no one cares to be left in that precarious condition, we have concluded to reiterate the established rule, and apply it here.

The appeal is dismissed for want of jurisdiction, and the appellees recover their costs on the motion to dismiss; they are entitled to interest on the amount awarded in the decree appealed against from the time that decree was entered; and the case is remanded to the Circuit Court to proceed in accordance with our opinion passed down the twenty-first day of February, 1911.

47 *Final Decree.*

February 21, 1911.

This cause came on to be heard upon the transcript of record of the Circuit Court of the United States for the District of Massachusetts and a motion by the appellees to dismiss for want of jurisdiction and was submitted on briefs.

On consideration whereof, It is now, to wit, February 21, 1911, here ordered, adjudged and decreed as follows: The appeal is dismissed for want of jurisdiction, and the appellees recover their costs on the motion to dismiss; they are entitled to interest on the amount awarded in the decree appealed against from the time that decree was entered; and the case is remanded to the Circuit Court to proceed in accordance with our opinion passed down the twenty-first day of February, 1911.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

Order of Court.

April 20, 1911.

COLT and ALDRICH, *JJ.*: On motion of appellants, It is ordered that the mandate be, and the same hereby is, stayed till further order of court.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

48 *Petition for Appeal.*

(Filed October 4, 1911.)

The above mentioned appellants, Warren Ozro Kyle and William B. H. Dowse, respectfully show that the above entitled case is now pending in the United States Circuit Court of Appeals for the First Circuit and that a judgment has therein been rendered on the twenty-first day of February, A. D. 1911, dismissing the appeal from the Circuit Court of the United States for the District of Massachusetts and deciding that the appellees are entitled to interest on the amount awarded in the decree appealed against, and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the First Circuit has not final jurisdiction and that it is a proper case to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the First Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellants, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

WARREN OZRO KYLE, *pro se.*
WILLIAM B. H. DOWSE,
By FRED JOY, *Of Counsel.*

Appeal allowed.

OLIVER WENDELL HOLMES,
Associate Justice Supreme Court U. S.

Jan'y 10, 1912.

Assignment of Errors.

(Filed October 4, 1911.)

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file therewith their as-

signment of errors, as to which matters and things they say that the decree entered herein on the twenty-first day of February, A. D. 1911, is erroneous, to wit:

49 I. The Court erred in dismissing the appeal for want of jurisdiction.

II. The Court having dismissed the appeal for want of jurisdiction erred in ruling that appellees are entitled to interest on the amount awarded in the decree appealed against from the time that decree was entered.

III. The Court erred in remanding the case to the Circuit Court to proceed in accordance with its opinion passed down the twenty-first day of February, A. D. 1911.

Wherefore the appellants pray that said judgment and decree of said Circuit Court of Appeals may be reversed in all things.

WARREN OZRO KYLE, *pro se.*
WILLIAM B. H. DOWSE,
By FRED JOY, *Of Counsel.*

Order of Court.

October 4, 1911.

It is ordered that the petition for appeal to the Supreme Court be submitted on brief, said brief to be filed by October 11, 1911.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

Appellees' Motion for Mandate, etc.

(Filed October 6, 1911.)

And now come the appellees, John C. Hammond and others, and, not waiving their special appearance, move that a mandate now issue, and that the appellants' proposed petition for an appeal be not received, or, if received, that the same be denied.

The grounds for this motion are stated in the accompanying brief.

JOHN C. HAMMOND ET AL., *Appellees,*
By HOLLIS R. BAILEY, *Their Solicitor.*

50 United States Circuit Court of Appeals for the First Circuit, October Term, 1911.

No. 917.

WARREN OZRO KYLE et al., Appellants,
v.
JOHN C. HAMMOND et al., Appellees.

Petition for Appeal to Supreme Court.

Before Colt, Putnam, and Aldrich, JJ:

Opinion of the Court.

December 16, 1911.

PUTNAM, *J.:*

This is a petition to review a decision of the Circuit Court in a matter in bankruptcy under the Act of March 2, 1867. On February 21, 1911, we dismissed the petition for want of jurisdiction; 186 Fed. Rep. 989. The petitioner now asks leave to appeal to the Supreme Court.

In Huntington v. Saunders, by an opinion dated on January 30, 1897, 72 Fed. Rep. 10, and 77 Fed. Rep. 394, we followed, under like circumstances, Wiswall v. Campbell, 93 U. S. 347, and held that we had no jurisdiction. Wiswall v. Campbell was followed by the Supreme Court in Leggitt v. Allen, 110 U. S. 741, and in Ingersoll v. Bourne, 154 U. S. 645. Consequently, by our opinion of February 21, 1911, we held that we had no jurisdiction, and therefore dismissed petition. At that time we were not disturbed by the decision of the Supreme Court in Huntington v. Saunders, 163 U. S. 318, which we refer to hereafter, because that decision concerned
51 only the jurisdiction of the Supreme Court on an appeal from a decree of dismissal. The Supreme Court might have jurisdiction to determine whether we had jurisdiction, but it did not do so in that case. The opinion, however, said what is indeed a dictum, that the Supreme Court has jurisdiction under circumstances like those now before us.

The precise point, however, came directly in issue later in Holden v. Stratton, 191 U. S. 115, and in Duryea Company v. Sternbergh, 218 U. S. 299, 301, 302, where Holden v. Stratton was approved on November 14, 1910. The confusion in the decisions of all the courts with reference to the practice in regard to bankruptcy appeals is shown by our opinion in Hutchinson v. Otis, 123 Fed. Rep. 14, especially at pages 18, 19 and 20. We refused an appeal, yet it was granted unqualifiedly by the Supreme Court, with a subsequent memorandum, on full consideration, that the appeal was allowed on the claim by the appellant that "full faith and credit" had not been given to certain proceedings in the courts of New

York, the Bankruptcy statutes clearly providing an appeal to the Supreme Court where a contention of that character is made, all of which appears where this case is reported in 190 U. S. 552, 553.

It seems to us the proper proceeding for the present petitioner would be by an application *by* the Supreme Court for a writ of mandamus, or, simpler, for a writ of certiorari. The latter was finally done in Holden v. Stratton, when it came up in 198 U. S. 202, and was decided on its merits.

The petitioner relies upon Sprecles Company v. McClain, 192 U. S. 397. There no question involved here was under consideration or could be. Another thus relied on is Denver Bank v. Klug, 186 U. S. 202, 205, where the appeal was dismissed, and Huntington v. Saunders was referred to only incidentally.

On the whole, we think we should adhere to the views which have heretofore governed us, and leave the petitioner to his remedy by mandamus or certiorari.

The petition for an appeal is denied.

52 *Order of Court.*

December 16, 1911.

It is ordered that the petition for an appeal to the Supreme Court be, and the same hereby is, denied.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

Order of Court.

December 18, 1911.

It is ordered that the mandate be, and the same hereby is, stayed till further order of court.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

Order of Court.

January 9, 1912.

It is ordered that the mandate herein issue on January 23, 1912, unless a petition for a writ of certiorari or a petition for a writ of mandamus has been filed in the Supreme Court.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

Thereafter, to wit, January 10, 1912, the appeal is allowed by Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States.

53 *Bond to Party on Appeal.*

United States Circuit Court of Appeals for the First Circuit.

Know all Men by these Presents, That we, Warren Ozro Kyle and William B. H. Dowse, Assignees in Bankruptcy of Elbridge L. Sweetser, bankrupt, as principals, and Fred Joy of Winchester and William A. Hayes, 2d, of Cambridge both of the County of Middlesex and Commonwealth of Massachusetts, as sureties, are held and firmly bound unto John C. Hammond of Northampton in the County of Hampshire and Commonwealth of Massachusetts, in the full and just sum of two hundred dollars to be paid to the said John C. Hammond or his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fifth day of January in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a Circuit Court of Appeals of the United States for the District of Massachusetts in a suit in equity depending in said Court between Warren Ozro Kyle and William B. H. Dowse, petitioners, and John C. Hammond, respondent a decree was entered against the said Warren Ozro Kyle and William B. H. Dowse and the said Warren Ozro Kyle and William B. H. Dowse having obtained an appeal to remove said cause to the Supreme Court of the United States, to reverse the decree in the aforesaid suit, and a citation directed to the said John C. Hammond citing and admonishing him to be and appear in the said Supreme Court of the United States, in the city of Washington, D. C., within thirty days.

Now, the condition of the above obligation is such, That if the said Warren Ozro Kyle and William B. H. Dowse shall prosecute the said appeal to effect, and answer all costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

WARREN OZRO KYLE. [SEAL.]
WM. B. H. DOWSE. [SEAL.]
FRED JOY. [SEAL.]
WILLIAM A. HAYES, 2d. [SEAL.]

Sealed and delivered in presence of—

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——.
——.

Approved:
OLIVER WENDELL HOLMES,
Associate Justice.

Jan'y 10, 1912.

54 UNITED STATES OF AMERICA, *ss:*

To John C. Hammond, of Northampton, in the County of Hampshire and Commonwealth of Massachusetts; James A. Tirrell, assignee of Magee Furnace Company, Dean, Foster & Co., Merrick Thread Co., Henry W. Dutton & Son, Judson A. Rockwood, A. E. Atwood, Stickney & Hurley; J. Winnett & Co.; George A. Brown, assignee of Capen, Sprague & Co.; Willis W. Stover, adm'r est. Louis Richardson, and E. Le Roy Sweetser, executor of the will of Mary A. Sweetser, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the First Circuit wherein Warren Ozro Kyle and William B. H. Dowse, Assignees in Bankruptcy of Elbridge L. Sweetzer, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this tenth day of January, in the year of our Lord one thousand nine hundred and twelve.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

55 JAN. 19, 1912.

Service of the within citation is hereby accepted.

HOLLIS R. BAILEY,
Attorney for the Within Named Respondents.

56 United States Circuit Court of Appeals for the First Circuit, October Term, 1911.

No. 917.

WARREN OZRO KYLE et al., Petitioners, Appellants,
v.
JOHN C. HAMMOND et al., Respondents, Appellees.

Clerk's Certificate.

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals in the cause entitled,

No. 917.

WARREN OZRO KYLE et al., Petitioners, Appellants,
v.
JOHN C. HAMMOND et al, Respondents, Appellees,

in said Circuit Court of Appeals determined, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal and also the original Citation issued upon the appeal of Warren Ozro Kyle et al., Petitioners, Appellants in said cause with acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-second day of January, A. D. 1912.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

Endorsed on cover: File No. 23,048. U. S. Circuit Court Appeals, 1st Circuit. Term No. 972. Warren Ozro Kyle and William B. H. Dowse, assignees in bankruptcy of Elbridge L. Sweetser, bankrupt, appellants, vs. John C. Hammond et al. Filed February 8th, 1912. File No. 23,048.

18

Office Supreme Court, U. S.
FILED.
FEB 23 1912
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1911.

No. 972

WARREN O. KYLE and W. B. H. DOWSE,
Appellants,

v.

JOHN C. HAMMOND ET AL., Appellees.

MOTION TO DISMISS OR TO AFFIRM, AND BRIEF IN SUPPORT OF SAID MOTION.

HOLLIS R. BAILEY,
Counsel for Appellees,
For the Purposes of said Motion.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON, MASS.

Supreme Court of the United States.

October Term, 1911.

No. 972

WARREN O. KYLE AND W. B. H. DOWSE,
APPELLANTS,

v.

JOHN C. HAMMOND ET AL.,
APPELLEES.

Motion to Dismiss or to Affirm.

And now come John C. Hammond *et al.*, appellees, and move the Court to dismiss the appeal in this case for want of jurisdiction because the decree of the United States Circuit Court, entered September 27, 1910, upon the revisory petition of the said Kyle and Dowse, was final under the Bankrupt Act of 1867 and there was no right of appeal either to this Court or to the Circuit Court of Appeals; and consequently there is no right of appeal to this Court from the decree of the Circuit Court of Appeals entered February 21, 1911, dismissing the appeal of said Kyle and Dowse.

And the appellees also move the Court to affirm said decree of the Circuit Court of Appeals, because, although the record in said cause may possibly show that this Court has jurisdiction, yet it is manifest that the appeal of the said Kyle and Dowse was taken for delay only or

that the question on which the jurisdiction depends is so frivolous as not to need further argument.

HOLLIS R. BAILEY,
Counsel for JOHN C. HAMMOND *et al.*, Appellees,
For the Purposes of this Motion.

Notice.

To WARREN O. KYLE, Esq., Counsel for the above-named Appellants:

Please take notice that on Monday, the 11th day of March A.D. 1912, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

HOLLIS R. BAILEY,
Counsel for the said JOHN C. HAMMOND *et al.*, Appellees,
For the Purposes of these Motions.

Brief.

I.

IN SUPPORT OF MOTION TO DISMISS.

A.

This is a proceeding begun in 1878 under the Bankrupt Act of 1867. The appellants Kyle and Dowse are the assignees in bankruptcy of Elbridge L. Sweetser. The said Kyle, in October, 1907, and in February, 1908, without obtaining any leave of Court, took $4252.76 of the estate for his services.

John C. Hammond and other creditors objected to this and the matter was heard by the register in bankruptcy, who ruled as follows:

> "It is the duty of an assignee claiming compensation for services rendered to obtain before taking the same an order of court fixing the amount of the same and authorizing payment. I find that Mr. Kyle the assignee violated this duty by paying himself the sum of $4252.76 for services without first obtaining the approval of court."

The matter was later heard by Judge DODGE of the District Court, who, on February 11, 1910, gave an opinion, in which he said:

> "I am obliged to hold that the Register was . . . right . . . in making the above rulings and findings."

The said assignees, Kyle and Dowse, on February 25, 1910, filed in the United States Circuit Court a revisory petition asking that Court to set aside the rulings and

findings aforesaid made by the register and by the District Court.

The Circuit Court, after hearing, made a decree September 27, 1910, affirming the rulings of the District Court.

This decree, by a long series of decisions, was final, and there was no right of appeal to this Court.

> *Morgan* v. *Thornhill*, 11 Wall. 65, 81.
> *Hall* v. *Allen*, 12 Wall. 452.
> *Mead* v. *Thompson*, 15 Wall. 638.
> *Marshall* v. *Knox*, 16 Wall. 554.
> *Coit* v. *Robinson*, 19 Wall. 285.
> *Bank* v. *Cooper*, 20 Wall. 178.
> *Stickney* v. *Wilt*, 23 Wall. 160.
> *Sandusky* v. *Bank*, 23 Wall. 293.
> *Wiswall* v. *Campbell*, 93 U.S. 351.
> *Hill* v. *Thompson*, 94 U.S. 322.
> *Glenny* v. *Langdon*, 98 U.S. 27.
> *Cleveland Ins. Co.* v. *Ins. Co.*, 98 U.S. 366.
> *Ingersoll* v. *Bourne*, 154 U.S. 645.

Or to the Circuit Court of Appeals.

> *Huntington* v. *Saunders*, 72 Fed. Rep. 10; 77 Fed. Rep. 394.

Judge LOWELL of the Circuit Court, in allowing the appeal from his decree, took the trouble to write an opinion, which appears in the record.

> See *In re Sweetser*, 185 Fed. Rep. 219.

In this opinion he says:

"If this court was to pass generally upon the

petitioners' right of appeal it would probably decide that none exists. The Court of Appeals for this Circuit appears to have held thus in *Huntington* v. *Saunders*, 72 Fed. 10."

The Circuit Court of Appeals, after considering briefs, made a decree February 21, 1911, dismissing the appeal for want of jurisdiction.

See *In re Sweetser*, 186 Fed. Rep. 989.

After waiting sixty days, the said Kyle and Dowse, when a mandate was about to issue, presented to the Circuit Court of Appeals a petition for an appeal to this Court. The Circuit Court of Appeals, after considering briefs, rendered an opinion December 19, 1911, stating that the said assignees were not entitled to an appeal. This opinion appears in the record.

After this opinion was handed down, the said Kyle and Dowse applied to Mr. Justice HOLMES of this Court to allow their appeal. Their appeal was allowed by him, and a bond for costs signed by two members of the bar in Massachusetts was approved.

B.

According to the cases above cited, it has long been settled that no appeal will lie from a final decree of a Circuit Court of the United States upon a revisory petition.

The reason for this is well stated by Mr. Justice CLIFFORD, in *Morgan* v. *Thornhill*, as follows:

"Adopt the theory of the appellees and the proceedings in bankruptcy might be protracted indefi-

> nitely as every question arising in the courts may be transferred first to the Circuit Court and then to this Court which would tend very largely to defeat all the beneficial purposes of the Bankrupt Act. For these reasons the appeal is dismissed for want of jurisdiction."

The reasons stated still hold good, and the same result should be reached in this case.

In *Wiswall* v. *Campbell*, 93 U.S. 347, Mr. Chief Justice WAITE gives other reasons as follows:

> "The cases are numerous in which it has been decided that we cannot review the action of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. . . .
>
> "The principle upon which these decisions rest is that a proceeding in bankruptcy from its commencement to its close upon the final settlement of the estate is but one suit. . . .
>
> "As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings."

This reason still holds good and should be decisive in the present case.

It is settled that under the Bankrupt Act of 1898 there is no right of appeal to this Court from a decree of the Circuit Court of Appeals upon a revisory petition.

> *Holden* v. *Stratton*, 191 U.S. 115.
>
> *Duryea Power Co.* v. *Sternberg*, 218 U.S. 301.

The opinion of the Circuit Court of Appeals, handed down December 19, 1911, denying the right of appeal, was based upon the cases hereinbefore cited and should be followed by this Court.

II.

IN SUPPORT OF MOTION TO AFFIRM.

If the Court should be of the opinion that it has jurisdiction to hear the questions raised by the appeal then the appellees respectfully submit that the case presented by said Kyle and Dowse is without merit and the appeal is clearly frivolous and intended for delay.

An inspection of the opinion of Judge DODGE of the District Court shows that Judge LOWELL of the Circuit Court was clearly right in affirming his rulings.

A consideration of the following dates taken from the record will show that the said Kyle and Dowse are not proceeding with diligence and are not acting with due regard for the rights of the creditors for whom they are supposed to be acting:

Report of register filed in Court	December 28, 1909.
Opinion of District Court	February 11, 1910.
Revisory petition filed	February 25, 1910.
Demurrer to same filed	March 12, 1910.
Opinion of Judge LOWELL	September 8, 1910.
Final decree by Judge LOWELL	September 27, 1910.
Petition for appeal by Kyle and Dowse	December 3, 1910.
Appeal allowed and citation issued	December 28, 1910.
Appeal entered in Circuit Court of Appeals	January 20, 1911.
Decree of Circuit Court of Appeals	February 21, 1911.

Petition for appeal	April	20, 1911.
Opinion denying right to appeal	December	19, 1911.
Appeal allowed and citation issued by Mr. Justice HOLMES	January	10, 1912.
Service accepted	January	19, 1912.
Appeal entered in this Court	February	10, 1912.

If the said Kyle and Dowse had acted promptly after the decree of the Circuit Court of September 27, 1910, or if they had acted promptly after the decree of the Circuit Court of Appeals February 21, 1911, the whole matter could have been disposed of before this Court adjourned in May, 1911.

The Circuit Court of Appeals, by its decree of February 21, 1911, allowed these appellees interest and costs.

It may be noted in this connection that the assignees could have brought the whole matter of their compensation before the District Court as early as the year 1908 by filing their final account with a petition for the allowance of extra compensation, but omitted to do this. Judge LOWELL refers to this in his opinion.

The appellees ask this Court to allow damages, interest, and costs under rule 23.

HOLLIS R. BAILEY,
For JOHN C. HAMMOND *et al.*, Appellees,
For the Purposes of said Motions.

SUPREME COURT, U. S.
FILED.
MAR 8 1912
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 972.

WARREN OZRO KYLE AND W. B. H. DOWSE,
APPELLANTS,

vs.

JOHN C. HAMMOND ET AL., APPELLEES.

BRIEF IN BEHALF OF APPELLANTS OPPOSING MOTION TO DISMISS OR TO AFFIRM.

WARREN OZRO KYLE,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 972.

WARREN OZRO KYLE AND W. B. H. DOWSE,
APPELLANTS,

vs.

JOHN C. HAMMOND ET AL., APPELLEES.

Brief in Behalf of Appellants Opposing Motion to Dismiss or to Affirm.

Statement of Case.

A demurrer to the petition filed by the appellants was sustained by the circuit court. From that decision, and the decree thereupon entered, the petitioners (appellants here) appealed to the Circuit Court of Appeals; their appeal was allowed and the case duly entered, but it was dismissed on motion for want of jurisdiction, and from that decision this appeal was taken.

It is the contention of these appellants that under the Judiciary Act of March 3, 1891, they had a right to be heard in the Circuit Court of Appeals. If the question arises as to why their petition was not filed in the Circuit Court of Appeals in the first instance, it should be noted that the Circuit Court in the First Circuit had already decided on a petition by John C. Hammond, one of the appellees here, that the circuit court, and not the Circuit Court of Appeals, had jurisdiction of such a petition. (See *in re* Sweetser, 157 F. R., 567.) Following the rule of law in the First Circuit as laid down by the court in that case, the petitioners were bound to present their petition in the first instance to the circuit court, although, in view of the act of March 3, 1891, said court had no longer final and appellate jurisdiction, it having been provided by section 4 of said act that no appellate jurisdiction should thereafter be exercised or allowed by the existing circuit courts. The appellants here were shut up therefore in this dilemma; having a clear right to adjudication on their petition by the Circuit Court of Appeals they were compelled by the rule of the case, laid down and enforced at the instance of the appellees here, to go to the circuit court, and with a clear right of appeal from any and every decision of a circuit court to the Circuit Court of Appeals, expressly given by the act of March 3, 1891, section 6, they are met with a refusal of the Circuit Court of Appeals to exercise jurisdiction, because before

said act was passed this court, having jurisdiction extending only to a re-examination of *final judgments or decrees in suits of law or in equity* (to use the language of this court in Wiswall *vs.* Campbell, 93 U. S., at p. 348) had dismissed appeals on petitions in cases arising under the law of 1867. This clearly amounts to such denial of justice as to arrest any hasty action of this court in dismissing this case if the questions involved are weighty and important and not merely frivolous, as the appellees suggest.

It will appear on examination of the case that it is proposed to deprive an attorney of his lien for compensation on the fund he has created and preserved by his services in relation thereto; to compel a co-assignee who has incurred liability for the expenses of necessary, long-continued and successful litigation for the estate to pay into the bank from his own funds an amount equal to what has already been expended for the benefit of the estate; to deny the administrators of a trust their right to be heard as to the propriety and necessity of their expenses for the estate, and to charge them with default, before settling their accounts.

In the struggle to protect assets the petitioners were brought into this court in 1907 by John C. Hammond, one of the appellees, who was then seeking, with the assistance of counsel for the appellees in this matter, to appropriate the entire estate to himself.

See Hammond *vs.* Whittredge, 204 U. S., 538.

BRIEF OF THE ARGUMENT.

We respectfully dissent from the argumentative statement in the motion of the appellees that this case must be dismissed because the decree of the circuit court was final. No such finality appears in the Bankrupt Act of 1867, and not a single citation is made on brief of appellees of any case decided after the act of March 3, 1891, except Huntington *vs.* Saunders, 72 Fed. Rep., 394, which was not followed or approved in the same case when brought here on appeal. (Huntington *vs.* Saunders, 163 U. S., 319.) It is clear that in the case at bar the matter in controversy exceeds one thousand dollars besides costs. It is clear, as this court says in Huntington *vs.* Saunders, *supra,* that "This is not one of the cases in which the decrees or judgments of the Circuit Courts of Appeals are made final." It would seem to be clear that the result of the decision of this court in Huntington *vs.* Saunders, 163 U. S., 319, is this: The Circuit Court of Appeals for the First Circuit should have taken jurisdiction of our appeal from the circuit court. From the decision of the Circuit Court of Appeals declining to take jurisdiction we have as matter of right an appeal to this court, inasmuch as the decision of that court is not made final by the Judicial Code (see section 241) and the matter in controversy exceeds the sum of one thousand dollars besides costs. (Section 6 of the

act of March 3, 1891, 26 Stat. at L., 828; the U. S. Judicial Code, section 241.)

It is not true, as stated in the motion of the appellees, that "the decree of the United States Circuit Court, entered September 27, 1910, upon the revisory petition of said Kyle and Dowse, was final under the Bankrupt Act of 1867." There is not a word to that effect in said act, and the decisions of this court cited on the brief of appellees decide only that this court, prior to the act of March 3, 1891, "having jurisdiction extending only to a re-examination of *final judgments or decrees in suits at law or in equity*" (see Wiswall *vs.* Campbell, 93 U. S., at p. 348) did not have jurisdiction in the cases in which said decisions were rendered.

The decisions in cases cited which arose under the Bankrupt Act of 1898 are based on the language of that act, and apply only to appeals to this court from decrees of the Circuit Courts of Appeals on revisory petitions. Here we have no such decree. This is not a case arising under the Bankrupt Law of 1898. The Circuit Court of Appeals in this case declined to make any such decree, and dismissed the case for want of jurisdiction.

No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. (Stephens *vs.* Cherokee Nation, 174 U. S., 445, and cases cited in the opinion of the court at page 478.)

The circuit court has been abolished. (U. S. Judicial Code, 289.)

Whatever revisory power in bankruptcy on petition under U. S. Rev. Stat., § 4986, may remain in force can only be exercised by the Circuit Court of Appeals. The act of Congress, June 7, 1878, 20 Stats., 99, repealing the Bankrupt Act of 1867, contained a proviso that "the acts hereby repealed shall continue in full force and effect until the same (viz., pending cases, and rights of, and suits by, and against, assignees) shall be fully disposed of, in the same manner as if said acts had not been repealed;" but we dissent emphatically from the *dicta* in the opinion handed down by the Circuit Court of Appeals, February 21, 1911, that by this provision Congress directed "the same proceedings as though there had been no repeal," and that "in this particular the subject-matter of the appeal, including the case at bar, is entirely taken out of any other legislation of a general character, including the statute of March 3, 1891, establishing this court." Congress did not in the repealing act deprive itself of power to change procedure by legislation of a general character. Congress could still change or provide new remedies. Congress has abolished the circuit court. Procedure changes, and the rights under the repealed law, in cases pending at the time of repeal, must be worked out under such procedure and with such remedies as exist at the time the crisis may arise. The analogy contended for by the appellees between appeals to this court from the circuit court in the cases cited on their brief and an appeal to

the Circuit Court of Appeals under the Judiciary Act of March 3, 1891, and the present Judicial Code, cannot be maintained.

We have quoted the language of the old Judiciary Act as stated in the opinion of this court in Wiswall *vs.* Campbell, 93 U. S., at p. 348.

The first clause of section 6 of the Judiciary Act of March 3, 1891, is as follows:

> "SECTION 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

It will be noted by the section just quoted appeals are granted from "final decision," whereas by the earlier judiciary acts they were granted from "final judgments and decrees" "in civil actions." We desire to call attention to the contrast between the wording of the act under which we claim our right to appeal to the Circuit Court of Appeals, viz., "final decision in * * * the existing circuit courts," and the language of the prior acts under which Wiswall *vs.* Campbell, and Coit *vs.* Robinson, and the other early cases cited on brief of appellees were decided. The writ of error in Wiswall *vs.* Campbell was claimed under U. S. Rev. Stat., § 691, providing for writs of error from "all final judgments of any circuit

court * * * in civil actions," etc. The appeals in Coit *vs.* Robinson and Morgan *vs.* Thornhill were claimed under section 22 of the Judiciary Act of 1789, "final judgments and decrees in civil actions and suits in equity in a circuit court," and the act of March, 1803, providing for appeal from "all final judgments or decrees rendered in any circuit court in any case in equity," etc. (Coit *vs.* Robinson, 19 Wall., at page 276.) It is thus seen that, while the earlier acts provide for appeals from *"final judgments or decrees" "in civil actions,"* the act of 1891 grants the right of appeal from *"final decisions"* rendered in the circuit courts, without prescribing further, so far as this case is concerned, in express language, what kind of controversies must be "finally decided" in order that an appeal will lie to the Circuit Court of Appeals. We respectfully submit that this difference in wording is most significant, and is conclusive in our favor. The word "decision" is broader than the word "judgment" or the word "decree." It includes the "determination of questions" as well as judgments and decrees. Assuming that the decision of the circuit court in the case at bar was the decision of a *question*, it nevertheless was *"final decision"* in the then existing circuit courts, and so comes within the sixth section of the act of 1891.

It should be noted that the words "unless otherwise provided by law" refer only to provisions of the same act or to contemporaneous and subse-

quent acts and do not include provisions of earlier statutes.

Paquete Habana, 175 U. S., 677.
Lau Ow Bew *vs.* United States, 144 U. S., 47-57.
Hubbard *vs.* Sobey, 146 U. S., 56.
American Construction Co. *vs.* Jacksonville Ry., 148 U. S., 372, 383.

Finally, reference is made in brief of appellees to the questions sought to be presented to the Circuit Court of Appeals as being without merit, frivolous and intended for delay. That these questions, presented in good faith, are of the utmost importance will appear on examination.

It was held by this court *In re* Paschal, 10 Wall., 483, that the attorney or solicitor who is also counsel in a cause, has a lien on moneys collected therein for his fees and disbursements in the cause.

In the case of McPherson *vs.* Cox, 96 U. S., 404, this court held that a trustee who had rendered service as attorney in relation to his trust had a lien on the trust property in his hands for money due him for his services as attorney.

In McKelvy's Appeal, 108 Pa. St., 615, delivering the opinion of the court, Justice Paxson said:

> "Its existence (namely of the fund) is due in great measure to his professional services. To the extent of the value of those services, then, the fund belonged to him;

that is he was the equitable owner to the amount of his fee."

In re Bender's Will, 111 App. Div. (N. Y.), 23-30, the court says in the opinion:

> "This right of lien is not affected by the fact that the client is an executor and the services were rendered and moneys and property received on behalf of the estate."

To the point that this lien binds assets in bankruptcy, see *Ex parte* Bowden, *re* Bush, 2 Deacon & Chitty, 182; *Ex parte* Yalden, *re* Austin, L. R., IV Ch. Div., 29.

That a person acting in a double capacity as solicitor and counsel and trustee has a lien for services was decided by this court in McPherson *vs.* Cox, cited above. See also to the same point:

Newington Local Board *vs.* Eldridge, L. R., 12 Ch. Div., 349.

King *vs.* Sankey *et al.*, 6 Nev. & Man., 839.

Commonwealth *vs.* Eagle Ins. Co., 14 Allen, 344-346.

In Fulton *vs.* Davidson, 3 Heisk. (Tenn.), 614, 643, Nicholson, C. J., in opinion of court, says:

> "Nor does the fact that Jno. M. Bright was executor as well as collector of the estate interfere with his right to compensation as a solicitor or counsellor."

The real question is, What are the assets of the estate. In equity the assets of the bankrupt estate

do not consist of the total amount awarded upon the *chose in action,* so long strenuously litigated by the appellee Hammond and his counsel, but rather what was realized out of it, after deducting reasonable expenses of that litigation, including the reasonable fee of counsel, for which a lien was claimed. It was ruled that Dowse should deposit money retained by counsel, of which he had not received a dollar, though he had incurred liability for expenses and fees in this necessary and expensive litigation.

The assignees are under bonds and the estate can never suffer loss.

The district court should first determine the amount due for services and expenses, for which a lien must be recognized and preserved.

As Judge Lowell said, *in re* Mitchell, *Ex parte* Sherwin, F. C. 9658; 16 N. B. R., 535, in district court. District of Massachusetts, Jan. 5, 1878—

> "There is no doubt that assignees are trustee with great power and large discretion. They have the legal title and control of the property as fully as the bankrupt had, and it has been repeatedly decided that statutes, or rules having the binding power of statutes, which regulate the administration of their trust * * * are merely directory."

We repeat, these questions are not frivolous. The good faith of a counsellor of this court is not to be impugned by counsel because he did not suc-

ceed in his attempt to wrest the whole fund from the estate, and it is not frivolous to seek recognition of important and substantial legal rights by every remedy the law affords.

Respectfully submitted,

WARREN OZRO KYLE AND
W. B. H. DOWSE,
By WARREN OZRO KYLE,
Of Counsel.

KYLE *v.* HAMMOND.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 972. Submitted March 11, 1912.—Decided March 18, 1912.

Under the saving clause of the act of June 7, 1878, 20 Stat. 99, c. 160, the review of the order in this case was not provided for by the Judiciary Act of 1891.

Mr. Hollis R. Bailey, for appellees, in support of motion to dismiss or affirm.

Mr. Warren Ozro Kyle, for appellants, in opposition thereto.

Per Curiam: Before the repeal of the Bankruptcy Act of 1867 the decision of the Circuit Court would have been final. *Wiswall* v. *Campbell*, 93 U. S. 347, 348, and cases cited; *Cleveland Ins. Co.* v. *Globe Ins. Co.*, 98 U. S. 366. In view of the saving clause of the repealing act of June 7, 1878, 20 Stat. 99, we are of opinion the review of such an order was not provided for by the Judiciary Act of 1891.

The decision in *Huntington* v. *Saunders*, 163 U. S. 319, is not to the contrary. There it was merely decided that if the act of 1891 authorized a review of analogous orders, the one sought to be reviewed did not involve the requisite jurisdictional amount.

The appeal is dismissed for want of jurisdiction.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911.

Order: It is ordered by the court that section 3 of rule 37 be amended so as to read as follows:

"3. Where an application is submitted to this court for a writ of certiorari to review a decision of a circuit court of appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term."

Promulgated June 10, 1912.